NO. 20274

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AERO SPACELINES, INC., a corporation,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JONES and BEDNAR

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Los Angeles, California 90036

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Aero Spacelines, Inc.,
a corporation.

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JURISDICTION

Appellant instituted this action on October 14, 1964 to recover from appellee civil penalties of $3,000.00, under the provisions of 49 U.S.C.A. 1471(a) of the Federal Aviation Act of 1958 as amended (49 U.S.C.A. 1301 et seq.). The penalties sought to be imposed are applicable to three flights of appellee's aircraft BOEING B 377 PG, on September 20, 1963, October 26, 1963, which were asserted to have been made in violation of Civil Air Regulation 45.2 (14 C.F.R. 45.2) promulgated by the Federal Aviation Administrator.

The amount of the penalty for each flight constitutes the maximum penalty which may be imposed under 49 U.S.C.A.

1471(a).

Jurisdiction was conferred upon the District Court by Sec. 1487(b) of 49 U. S. C. A. (the Federal Aviation Act as amended) and by Title 28, U. S. C. A. Sec. 1345.

Both parties to this proceeding filed motions for summary judgment in the lower court, and on April 30, 1965, Findings of Fact and Conclusions of Law were signed and filed, and on the same day a judgment was entered by the United States District Court, Southern District of California, Central Division, in favor of appellee.

Appellant's Notice of Appeal was filed June 23, 1965. The jurisdiction of this court is conferred by Title 28, Sec. 1291.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations cited by appellant, the following are pertinent to this matter:

1. 49 U.S. C. A. Sec. 1421:

"(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

* * *

"(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure,

as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

* * *

"Exemptions

"(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest."

2. 49 U.S.C.A. Sec. 1423:

* * *

Airworthiness certificates

"(c) The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety. Each such certificate shall be

registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator."

3. 49 U.S.C.A. Sec. 1430:

"(a) It shall be unlawful --

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

* * *

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter; and . . ."

* * *

QUESTION PRESENTED

Was the aircraft -- subject of this proceeding -- a "public aircraft", as defined under the Federal Aviation Act (49 U.S.C.A.

1301) by virtue of the provisions for its use in the contracts with NASA, and its use by that Agency of the Federal Government.

ARGUMENT

Summary of Argument

Historically, legislation adopted by the Federal Government with respect to the use of navigable air space has provided for three categories of aircraft, namely: military aircraft, public aircraft and civil aircraft.

In all Federal aviation legislation, public aircraft has been defined similarly and in every instance the use of such aircraft has been the determinative factor of its characteristics. Appellee contends the utilization of its aircraft is conclusive under the Federal Aviation Act as to its character and that such utilization made of aircraft BOEING B-377 PG a public aircraft. As such the aircraft is exempt from the regulatory control of the Federal Aviation Administrator, since his and the Federal Aviation Agency's jurisdiction is confined solely to "civil aircraft" (49 U.S.C.A. 1303(e) and 1421; T. 54, line 31 to T. 55, line 5).

Appellee also contends the statute here involved under which the government instituted its suit for penalties, is a penal statute to be strictly construed against the government and which must be clear and certain for its application.

I

FEDERAL AVIATION LEGISLATION PRIOR TO THE FEDERAL AVIATION ACT OF 1958 HAS COVERED "PUBLIC AIRCRAFT" IN A MANNER CONSISTENT WITH THE CURRENT STATUTORY DEFINITION THEREOF.

The first legislation adopted by the Federal Government pertaining to Federal aviation and control of flight over the United States and its possessions, was the Air Commerce Act of 1926. A legislative history of this Act was compiled by Frederick E. Lee of the Office of Legislative Counsel of the United States Senate and is found in 2 U.S. Aviation Reports, page 117 and following. The Air Commerce Act was enacted on May 20, 1926, 69th Congress, 44 Stat. 568, after considerable legislative action by the Senate and House of Representatives.

Section 21 of the Senate Bill (S-41) provided:

"This Act shall not apply to aircraft owned or operated by the United States."

The House of Representatives proposed an amendment to the Senate Bill involving a slightly different approach, which contained a separate provision as to exempt aircraft.

Section (3) of the House amendment provided, in part:

"EXEMPT AIRCRAFT. -- (a) The Secretary of Commerce shall exempt from the requirements of regulations under section 2, except requirements as to registration or as to air traffic rules upon

established airways: (1) Public aircraft of the United States and airmen serving solely in connection therewith and air navigation facilities owned or operated by the United States or any governmental instrumentality thereof and used exclusively (except for emergency public use as provided in Section 5) in the service of the Federal Government; * * *."

Section 10 of the House amendment contained definitions, two of which apposite here are:

"(d) The term 'public aircraft' means an aircraft used exclusively in the governmental service.

"(e) The term 'civil aircraft' means any aircraft other than a public aircraft."

The final Senate Bill incorporated identical definitions to the above.

It is significant that where the Senate originally provided the Act was inapplicable to aircraft "owned or operated by the United States", the House amendment and final Act exempted public aircraft which was defined to mean "an aircraft used exclusively in the governmental service" (our emphasis).

Parenthetically it is to be observed the foregoing definitions are substantially identical to the definitions of the same terms in the Federal Aviation Act of 1958, 49 U.S.C.A. Sec. 1301 (14) and (30) with which we are here concerned.

In the report accompanying Senate Bill 41, the origin of the Air Commerce Act of 1926, it was said:

"1. The bill relates solely to civil air navigation." 2 U. S. Aviation Repts., 145.

"6. Public aircraft. -- Under the Senate Bill public aircraft were exempt from all the regulatory interstate and foreign commerce requirements of the Act. Under the House amendment public aircraft were exempt in respect of all navigation from the requirements as to airworthiness and the rating of airmen, but not from air traffic rules upon civil airways nor from registration. Under the substitute, public aircraft of the Federal Government are exempt from the airworthiness requirements and the regulations as to the rating of airmen, unless such aircraft are voluntarily registered; but public aircraft of the Federal Government are not exempt from the air traffic rules, except insofar as the Secretary of War has control over exclusively military aircraft upon military airways." (2 U. S. Aviation Repts. 170.)

As technology in the aircraft industry moved forward the range of aircraft increased, and the ramifications of the use

thereof became broader it became necessary to upgrade federal legislation, which culminated in the Civil Aeronautics Act of 1938. A comprehensive study of this Act is to be found in Rhyne Civil Aeronautics Act, anno. (1939). That act contained definitions of 31 words and phrases, those pertinent here being as follows:

"(14) 'Civil Aircraft' means any aircraft other than public aircraft."

"(30) 'Public aircraft' means an aircraft used exclusively in the service of any government or any political subdivision thereof, including the government of any State, Territory or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes."
(Emphasis added.)

Here again emphasis has been placed by the legislators upon the exclusive use in governmental service as the determining characteristic of a public aircraft. It also is interesting to note the above definitions in the 1938 Civil Aeronautics Act have been carried in their entirety into the Federal Aviation Act of 1958, 49 U. S. C. A. Sec. 1301(14) and (30), and are identically numbered.

Prohibitive conduct and penalties therefor were prescribed in the Civil Aeronautics Act of 1938 by Sections 610 and 901. Section 610(a) provided in part as follows:

"Sec. 610(a). It shall be unlawful --

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate; * * *

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation or certificate of the Authority under this title."

(Rhyne Civil Aeronautics Act, anno. p. 275.)

and Section 901(a) thereof provided:

"SEC. 901. (a) Any person who violates (1) any provision of Title V, VI, and VII of this Act, or any provision of subsection (a)(1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged."

(Rhyne Civil Aeronautics Act, anno. p. 279.)

The language with respect to the above quoted prohibition is practically identical to the same numbered subparagraphs of

Section 1340(a) 49 U. S. C. A. pertaining to violations, and the provisions above quoted with respect to penalties are substantially the same as those found in Sec. 1471 of 49 U. S. C. A., the current Federal Aviation Act.

II

THE CONDITIONS GOVERNING THE USE OF BOEING AIRCRAFT B-377 PG, AND THE NASA CONTRACT PROVISIONS PERTAINING TO SUCH USE, ESTABLISHED ITS CHARACTERISTIC AS A "PUBLIC AIRCRAFT".

Two contracts between the appellee and NASA are involved in this proceeding and are mentioned here in chronological order. These contracts and the conditions imposed as to the use of the aircraft are germane here.

1. The contract of May 28, 1963.

Significant with respect to this contract are the events preceding and following its execution date. On Janua ry 24, 1962, appellee's predecessor filed an application for airworthiness certificate of Aircraft B-377 PG (T. 55, 60). On March 12, 1963, appellee filed its application for exemption under the airworthiness certificate from Parts 1 and 8 of the Civil Air Regulations (T. 55, 62). On May 2, 1963, the requested exemption from Parts 1 and 8 of the Civil Air Regulations was granted by the Federal Aviation Agency (T. 56, 63).

Thus, prior to the contract date, the exemption from Parts 1 and 8 of said regulations had been granted said aircraft (T. 63).

Certain language of the exemption (the entire Grant of Exemption being set forth in full in the transcript (T. 63)), is significant and pertinent to the exclusivity of use which so clearly constitutes the determinative factor of a public aircraft, and consists of the following:

> "(1) The cargo shall consist solely of S-IV Saturn and Apollo spacecraft modules and related cargo;
>
> "(2) The persons carried shall be restricted to the technicians designated by the National Aeronautics and Space Administration and carried to insure security and monitor loads to which cargo components are subjected in transit; and
>
> "(3) Cargo and persons may be carried only between locations as prescribed by the National Aeronautics and Space Administration. * * * "
>
> (emphasis added.)

The contract with NASA dated May 28, 1963 (T. 64), was entered into for the purpose of meeting feasibility tests by NASA (T. 56, lines 7-22) but it is obvious negotiations had preceded such contract date by a considerable period of time because of the prospective language therein pertaining to certification of

the aircraft. Portions of the contract language are also pertinent and they are:

"ARTICLE III - GOVERNMENT FURNISHED EQUIPMENT AND PERSONNEL.

"A. EQUIPMENT: THE GOVERNMENT SHALL FURNISH GROUND SUPPORT EQUIPMENT AS REQUIRED TO DELIVER CARGOES TO, AND RECEIVE CARGOES FROM, THE AIRCRAFT. THIS EQUIPMENT INCLUDES BUT IS NOT LIMITED TO:

"1. LIFT TRAILERS FOR RAISING AND LOWERING OF CARGO TO AIRCRAFT FLOOR HEIGHT.

"2. PALLETS, COMPATIBLE WITH SUPPORT RAILS IN THE AIRCRAFT, AND THE CARGOES.

"3. SATURN S-IV DUMMY STAGE.

"4. ALL NECESSARY FUEL AND OIL AS REQUIRED IN THE PERFORMANCE OF THIS CONTRACT.

"ARTICLE IV - FLIGHT OPERATIONS.

"A. DURING THE PERIOD OF PERFORMANCE, ALL MOVEMENTS OF THIS AIRCRAFT SHALL HAVE THE ADVANCE APPROVAL OF THE CONTRACTING

OFFICER. THE CONTRACTOR SHALL FURNISH THE AIRCRAFT, FULLY STABILIZED, READY FOR LOADING, WITH FULL OPERATION CREW WITHIN 48 HOURS AFTER RECEIPT OF NOTICE FROM THE CONTRACTING OFFICER.

"B. THE CONTRACTOR SHALL SUBMIT NO LATER THAN MIDNIGHT THURSDAY OF EACH WEEK A PLAN OF OPERATIONAL MOVEMENTS FOR THE NEXT SUCCEEDING WEEK, UNTIL THE AIRCRAFT HAS BEEN FORMALLY CERTIFICATED BY THE FEDERAL AVIATION AUTHORITY (FAA). * * * AFTER FAA CERTIFICATION ALL MOVEMENTS OF THE AIRCRAFT SHALL BE AUTHORIZED BY THE CONTRACTING OFFICER ON A TRIP-BY-TRIP BASIS."

"ARTICLE V - PERFORMANCE REQUIREMENTS AND PAYMENT * * *

"B. THE CONTRACTOR SHALL PUT FORTH HIS BEST EFFORT TO OBTAIN FORMAL FAA CERTIFICATION OF THIS AIRCRAFT BY JUNE 27, 1963. A COPY OF THE FAA CERTIFICATION WILL BE FURNISHED THE

CONTRACTING OFFICER ON OR BEFORE JUNE 27, 1963. IN THE EVENT THE CONTRACTOR HAS NOT OBTAINED THE FAA CERTIFICATION OF AIRWORTHINESS FOR THIS AIRCRAFT BY JUNE 27, 1963, THE PERIOD OF PERFORMANCE OF THIS CONTRACT SHALL AUTOMATICALLY BE EXTENDED BY A NUMBER OF DAYS EQUAL TO THE DAYS OF DELAY BEYOND JUNE 27, 1963. IN NO EVENT, HOWEVER, SHALL THE TERM OF THIS CONTRACT EXTEND BEYOND AUGUST 31, 1963. * * * " (Emphasis added.)

From the excerpted contract language it appears clear the use of the B-377 PG Aircraft was to be exclusively that of NASA though the word "exclusive" is not in fact used in the first contract. As an example, during the performance period under the contract all movements of the aircraft required advance approval of the contracting officer, and among others of government furnished equipment are necessary fuel and oil for performance of the contract. Certainly the government would not supply fuel and oil for an aircraft to be used other than the government, and since all movements of the aircraft required approval of the contracting officer it is obvious the aircraft could not be used except for government purposes specified by the contracting officer.

The only reference in the first contract pertaining to

certification is that applicable to the aircraft itself. For example, Article IV B. speaks of "the aircraft" being "formally certificated" (T. 64) and "After FAA certification all movements of the aircraft * * *"; (T. 64) and in Article V B. reference is made to obtaining "formal FAA certification of this aircraft" and if "certification of airworthiness for this aircraft" (T. 64) was not obtained by a certain date the performance period was extended. It seems manifest the government under the May 28, 1963, contract provided by apt language without using the exact words for its exclusive use of the aircraft, the government requiring only as to the aircraft an airworthiness certificate.

On July 10, 1963, the Certificate of Airworthiness was issued (T. 56, 65) and simultaneously the FAA issued Restricted Operating Limitations (T. 56, 66). The language of both these documents is also pertinent to the public aircraft question and all of such pertains to the exclusive use inquiry. The relevant language of the Airworthiness Certificate is:

> "1. This aircraft is certificated only for the special purpose of carrying spacecraft modules, persons, and cargo for compensation or hire for the National Aeronautics and Space Administration. (Ref. FAA Exemption 258 dated May 2, 1963; Regulatory Docket No. 1679)
>
> "2. The operation of this aircraft for any purpose other than that for which it is certificated is prohibited.

"3. Operating Limitations dated July 10, 1963 are a part of this certificate." (T. 65) (Emphasis added.)

Restrictions contained in the Restricted Operating Limitations pertaining to the aircraft relevant to the use question are:

"1. The only flights authorized are for the special purpose of carrying spacecraft modules, persons and cargo for compensation or hire for the National Aeronautics and Space Administration, subject to the following conditions (Ref. FAA Exemption #258, dated May 2, 1963 - Regulatory Docket No. 1679):

"a. The cargo shall consist solely of S-IV Saturn and Apollo spacecraft modules and related cargo;

"b. The persons carried shall be restricted to the technicians designated by the National Aeronautics and Space Administration and carried to insure security and monitor loads to which cargo components and subject in transit; and

"c. Cargo and persons may be carried only between locations as prescribed by the National Aeronautics and Space Administration." (T. 66)(emphasis added,

except for word "only" in 1 above.)

In light of the restrictions contained in the exemptions from Parts 1 and 8 of the Civil Air Regulations (T. 63), the provisions of the May 28, 1963 contract (T. 64), the control thereunder of all movements of the aircraft, the limiting provisions of the Airworthiness Certificate (T. 65) and of the Restricted Operating Limitations (T. 66), it is submitted that on no logical basis can it be argued that BOEING B-377 PG was not "an aircraft used exclusively in the service of any government"?

2. The contract of September 6, 1963.

At the date of this contract all affirmative obligations imposed upon appellee under the May 28, 1963 contract had been performed, all of which, sofar as this controversy is concerned, pertained solely to the certification of the aircraft. As a consequence of such performance the Air Worthiness Certificate and the Restricted Operating Limitations, both applicable to the aircraft, were issued on July 10, 1963 (T. 56, lines 23-28 and T. 65 and 66).

Significant language of the September 6, 1963 contract pertinent to the use question here presented is as follows:

"ARTICLE I - GENERAL

"THE CONTRACTOR, AS AN INDEPENDENT CONTRACTOR AND NOT AS AN AGENT OF THE GOVERNMENT, SHALL, ON THE TERMS AND CONDITIONS HEREINAFTER MORE PARTICULARLY

SET FORTH, FURNISH TO THE GOVERNMENT FOR ITS EXCLUSIVE USE AND CONTROL ONE B-377 PG AIRCRAFT, SERIAL NO. M1024V AND FURNISH ALL PERSONNEL, FACILITIES, EQUIPMENT, AND MATERIALS, OTHER THAN MAY BE FURNISHED BY THE GOVERNMENT, NECESSARY FOR THE COMPLETE OPERATION AND MAINTENANCE OF THE AIRCRAFT IN ORDER TO PROVIDE AIR TRANSPORTATION OF S-IV STAGES, LARGE BOOSTER COMPONENTS, TOOLS, AND FIXTURES, AND SUCH OTHER CARGOES AS MAY BE SPECIFIED BY THE CONTRACTING OFFICER.

"ARTICLE II - CONTRACTOR FURNISHED EQUIPMENT AND PERSONNEL

"A. EQUIPMENT: THE CONTRACTOR SHALL FURNISH, FOR THE GOVERNMENT'S EXCLUSIVE USE AND CONTROL, ONE (1) CONVERTED BOEING 377 STRATOCRUISER AIRCRAFT (COMMONLY KNOWN AS THE 'PREGNANT GUPPY') WITH THE CAPACITIES, CAPABILITIES, AND/OR APPURTENANCES AS FOLLOWS:

"B. FUEL AND OIL: THE CONTRACTOR SHALL FURNISH ALL NECESSARY FUEL AND OIL REQUIRED IN THE PERFORMANCE OF THIS CONTRACT. THE CONTRACTOR SHALL BE AUTHORIZED

TO PURCHASE SUCH FUEL AND OIL FROM THE GOVERNMENT AT COST. * * *"

(Emphasis added except article heading.)

Subsequent to the date of the above contract, and on September 20, 1963, October 26, 1963, and October 30, 1963, three movements of the aircraft were undertaken for the purpose of transporting spacecraft hardware and missile components for NASA. These flights immediately brought to a head the opposed contentions of appellee and the FAA as to whether the aircraft was a public aircraft, and whether to operate said aircraft appellee was required to secure a Commercial Operator's Certificate (T. 57, lines 21-32 and T. 52, lines 7-19).

Under the contract appellee was obliged to "furnish to the government for its exclusive use and control" (Article I quoted above) and "furnish, for the government's exclusive use and control" (Article II A, above quoted) the aircraft in question. It is doubtful whether language of greater clarity could be composed which would more perfectly meet the definition of public aircraft under the Federal Aviation Act, 49 U.S.C.A. Sec. 1301 (30), that is to say, an aircraft used exclusively in the service of any government. An additional fact bearing on exclusive use by the government is supplied by the provisions under the September 6, 1963, contract whereunder the government supplied fuel and oil for the aircraft at cost. Where except in the interest of an exclusive governmental function is government property ever supplied

to a contractor at the government's cost?

Appellant repeatedly argues that a governmental agency cannot by virtue of contract establish the status of an aircraft subject to such contract. Appellee submits on the contrary that contractual provisions as such are immaterial and that the fact of use must be and is the determining factor under the definition of public aircraft in the Federal Aviation Act if as a consequence of such use theuse is in fact exclusive by the government (and we assume there is no question that the use was by the United States Government through its agency, NASA).

III

THE QUESTION OF CERTIFICATION IS TWO-FOLD, VIZ., CERTIFICATION OF THE AIR-CRAFT AND CERTIFICATION OF THE OPERATOR OF AN AIRCRAFT, AND NEITHER IS MUTUALLY DEPENDENT UPON THE OTHER.

The government has maintained it was necessary under the Federal Aviation Act that appellee comply with requirements pertaining to two types of certification, viz., (1) Airworthiness Certification of the aircraft and (2) certification of appellee as a commercial operator. In this respect, the government misconstrues the significance of certification, as is indicated by its assertion as a part of Item 2 on page 16 of its opening brief, that "Certification of an aircraft is required of civil aircraft only under Part 42 of the Civil Air Regulations," * * *. The only statutory requirement for Airworthiness Certification is found in the

prohibition to operate a civil aircraft in air commerce without a currently effective Airworthiness Certificate in 49 U. S. C. Sec. 1430 (a)(1) and in the enabling provision of the Federal Aviation Act pertaining to such certificates and their issuance in 49 U. S. C. Sec. 1423.

The sole requirement pertaining to the Commercial Operator's Certificate is found in the rulings and regulations of the Administrator issued under the general rule and regulation-making power of such official. This authority is found in 49 U. S. C. Sec. 1421, which permits the Administrator in promoting the safety of flights of civil aircraft in air commerce to prescribe and revise from time to time reasonable rules and regulations. These are found for the most part in the Civil Air Regulations. In this proceeding appellee was cited for three violations of Part 42 of Civil Air Regulations, which requires the owner of a civil aircraft having more than 12, 500 lbs. maximum certified take-off weight to possess a Commercial Operator Certificate. Authority for the penalties imposed here is therefore the prohibition found in 49 U. S. C. Sec. 1430 (a)(5) for any person to operate aircraft in air commerce in violation of any other rule or regulation of the Administrator. Thus on the certification question of defendant as a commercial operator as distinguished from certification of the aircraft, there is again raised the spector of civil versus public aircraft, the definitions of which are precise in the Federal Aviation Act, 49 U. S. C. Sec. 1301 (14) and (30). A solution of the question requires a determination of what constitutes a public

aircraft since, as defined, any aircraft other than a public aircraft is a civil aircraft (49 U.S.C. Sec. 1301 (14)).

The government contends the intention of NASA had a marked if not decisive bearing upon the determination of whether appellee was required to secure certification as a commercial operator in order to perform under the September 1963 contract and provide to NASA at its direction the exclusive use and control of the aircraft. If the intention of that agency of the Federal government has any bearing upon statutory interpretation, the only evidence of such with respect to certification which ever arose had to do with the airworthiness of the aircraft. Under the May 1963 contract as above noted, appellee undertook a number of contractual obligations. In brief, these referred to FAA certification of the aircraft, the meeting of FAA requirements for certification of the aircraft, the obtaining of FAA Certificate of Airworthiness (only applicable to the aircraft) and the meeting of maintenance and safety standards prescribed and approved by the FAA. The obligation undertaken to secure certification of the aircraft was fully performed and the Airworthiness Certificate required to be secured by appellee under the May 1963 agreement was issued nearly two months before the September 6, 1963 contract, and more than two months prior to the flights here in question. The Airworthiness Certificate issued by the Federal Aviation Agency limited utilization of the aircraft, and the restricted operating limitations issued at the same time as the Airworthiness Certificate imposed further restrictions impinging upon the use of the aircraft. In fact no use

of the aircraft could be made without the consent and pursuant to the direction of NASA, and then only to carry spacecraft modules, persons and cargo as prescribed by NASA.

During all the times the aircraft was in the course of modification and during its testing and feasibility studies, there existed great uncertainty as to whether at any time and in any event appellee as the operator of the aircraft was required to secure a Commercial Operator's Certificate. This in general parlance is paraphrased as certification of the operator. See the affidavit of John M. Conroy (T. 51, line 26 to p. 19, line 52; p. 57, lines 21-23). Because of this uncertainty the application of appellee's predecessor for a Commercial Operator's Certificate was never withdrawn and by appellee continued to be processed notwithstanding the controversy which existed as to the application of the Civil Air Regulations as to appellee sofar as its operations were concerned. It is submitted no reasonable consideration of the facts, the provisions of the September 1963 contract, the definition of public aircraft in the Federal Aviation Act, the comprehensive restrictions imposed with respect to the aircraft under the Grant of Exemption, the Airworthiness Certificate and the Restricted Operating Limitations admits of any conclusion except that appellee's aircraft was at the times of the flights in controversy a public aircraft and as such beyond the jurisdiction of the Federal Aviation Agency or its Administrator.

Accordingly imposition of the penalties here asserted must be denied because,

1. If asserted under 49 U.S.C. Sec. 1430 (a)(1) with respect to the Certificate of Airworthiness, such certificate had been issued and was outstanding as to the aircraft prior to the flights in question (T. 56, line 23);

2. If asserted under 49 U.S.C. Sec. 1430 (a)(5) with respect to the Commercial Operator's Certificate, which is solely a requirement of a regulation of the Administrator, said regulation is not here applicable because the jurisdiction of the Administrator and the act extend only to civil aircraft except in cases not here pertinent. The Administrator can issue regulations only with respect to Civil Aircraft, 49 U.S.C. Sec. 1420, and as indicated above, it is submitted Aircraft BOEING B-377 PG was at the time of the flights a "public aircraft".

IV

THE STATUTE HERE INVOLVED IS A PENAL STATUTE TO BE STRICTLY CONSTRUED AS AGAINST THE GOVERNMENT AND IT MUST BE CLEAR AND CERTAIN TO WARRANT PENALTIES THEREUNDER BEING ASSESSED AGAINST APPELLEE.

---

49 U.S.C. Sec. 1471 provides that any person who violates any provision of the subchapters therein referred to, or any rule,

regulation or order issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. The only subchapter pertinent to this controversy is Subchapter VI. Section 1430 of 49 U.S.C., a part of Subchapter VI, provides in part:

> "(a) It shall be unlawful --
>
> "(1) For any reason to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate; * * *
>
> "(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter; and * * *."

It is clear penalties assessed against appellee in this proceeding originate under the above portions of Sec. 1430, since the government has continuously maintained appellee's aircraft B-377 PG, notwithstanding the limitations upon its use under the Grant of Exemption, the Airworthiness Certificate, the Restricted Operating Limitations and the provisions pertaining to its use under both the contracts with NASA, is a civil aircraft, the operation of which by appellee requires both a Certificate of Airworthiness as to the plane and a Commercial Operator's Certificate for appellee as the owner of such plane. The complaint (T. 2-4) in fact identifies appellee's plane as a civil aircraft and the government could hardly contend to the contrary, since the

jurisdiction of the Federal Aviation Agency is in essence limited to civil aircraft.

The word "penal" in common use has been enlarged to include under the term "penal statutes" all laws that command or prohibit certain acts and establish penalties for their violation (Richter v. Empire Trust Co., 20 F. Supp. 289, D. C. N. Y.). In the matter at hand the above statute proscribes certain actions and provides a penalty therefor, the maximum of which is $1,000 for each act.

A fundamental rule of statutory construction is that penal statutes must be construed strictly, i. e., construed in favor of the person sought to be subjected to their operation or strictly construed against the prosecution in favor of the person accused (United States v. Brown, 333 U. S. 18; United States v. Peoples, 50 F. Supp. 462, D. C., Cal.; United States v. Resnick, 299 U. S. 207) and such statutes will not be held to include offenses and persons other than those which are clearly described and provided for (United States v. Williams, 341 U. S. 70 and United States v. Resnick, supra). The transaction must be clearly within both the spirit and the letter of the statute to meet its prohibition, and if there be a fair doubt as to whether the charged act is embraced in such prohibition, resolution of the doubt is to be made in favor of the person against whom enforcement is sought. (Marchesi v. United States, 126 F. 2d 671.) This certainty and definiteness in a penal statute is a paramount requirement and a prime requisite for its validity (Bain v. Fleck, 92 N. E. 2d 770; Duhame v. State

Tax Commission, 179 P. 2d 252, Ariz.). So if a person of ordinary intelligence cannot understand its meaning, or if reasonably minded persons cannot agree on its meaning, the statute will be deemed invalid for vagueness and uncertainty (State v. Jay J. Garfield Building Co., 3 P. 2d 983, Ariz.; Ex parte Leach, 215 Cal. 536). The foregoing are fundamental rules of statutory interpretation and mean in essence that penal statutes must be clear and certain so as to provide ample notice of that which is comprehended within them to persons who may be subjected by virtue of their conduct to their prohibition. We submit the penal statute here concerned with is clear and admits of no strained or unusual interpretation. But if there exists a question as to the clarity of the statute such is to be resolved in favor of appellee under familiar rules of interpretation of penal statutes. A violation of Sec. 1471 gives right to the imposition of a penalty not to exceed $1,000 for each act. The defined violations above noted apply to civil aircraft and, as previously observed, jurisdiction of the Federal Aviation Act comprehends only civil aircraft. A question of determination next ensues, i.e., what does the Federal Aviation Act mean by civil aircraft? References to the definitions disclose that a civil aircraft is any aircraft other than a public aircraft and it is then necessary to ascertain what is a public aircraft. We find under the definitions that such an aircraft (which is outside the jurisdiction of the Federal Aviation Act) is one "used exclusively in the service of any government". From the facts in this matter we must then ascertain whether BOEING B-377 PG at the times

involved here met the definition of public aircraft. We earnestly submit it does. Being a public aircraft, penalties under 49 U. S. C. Sec. 1471 and the listed violations under 49 U. S. C. Sec. 1430 are not here applicable.

V

APPELLEE'S ANSWERS TO ARGUMENTS OF APPELLANT.

The appellant's arguments as presented in its brief and which appellee considers here in the order mentioned could be paraphrased as follows: (1) The government cannot through one of its agencies establish by contract the status of Aircraft B-377 PG; (2) even if the government through such agency by contract could so establish the status of the aircraft the contracts here show a contrary intent by NASA, and (3) Congress intended the term "civil aircraft" to apply to an aircraft used for commercial purposes of the operator.

As mentioned above, the statutory definitions of civil and public aircraft are simple, clear and understandable. The test, under the statute, is the use to which the aircraft is put, and what might occur under facts different than here presented appears quite immaterial.

The appellant complains that if the aircraft is not a civil aircraft then it is not subject to the Administrator's rules on safety and air traffic, and if not subject to those rules then the operator of the aircraft is not subject to other rules of the Administrator, for example, the examination of financial records and inspection

of the operator's facilities. Both these propositions are beside the point. Inspection of facilities of an operator by the Administrator is limited to one who operates a civil aircraft and thus we return to definitions. Contractual understandings between NASA and the appellee are not in themselves determinative - the only question to be answered has to do with the use to which the aircraft was put, and this is supplied by the facts and by the facts only, and not how the use came about. The facts in this matter are the subject of a stipulation (T. 54) to which reference must be made for a determination of the public aircraft question and nothing extraneous to such facts, we submit, is pertinent to this inquiry.

As was pointed out above, certification under the Federal Aviation Act involves (1) certification of the aircraft and (2) in certain cases outside the field of common carriers certification of the operator of specified aircraft.

All the references by appellant to portions of the two contracts with NASA are beside the point of what is or is not a public aircraft. How was the aircraft used is the salient point, and if so used in a manner to meet the terms of the statute defining public aircraft that would seem to end the matter.

It is fair to assume that both NASA and appellee were aware of hazards which could be encountered in the use of B-377 PG. Accordingly, certain standards were adopted by way of contract obligations to assure safety of plane, cargo, and authorized passengers. This then is the logical reason for the contractual undertakings pertaining to; airworthiness of the aircraft and

certification thereof; maintenance and preventive maintenance; compliance with safety standards, and level of maintenance and repair, all as required by the standards of FAA. We submit the contracting parties, cognizant of the need for appropriate safety and maintenance standards, adopted such in the contracts and in effect provided for FAA safety standards and requirements by reference.

From the outset there was uncertainty whether appellee was required to be certified as a commercial operator and for this very reason the application of its predecessor was never withdrawn but on the contrary continued to be processed by appellee (T. 71, line 17 to T. 72, line 5). Where does this indicate that "NASA intended" appellee to secure a Commercial Operator's Certificate?

Some significance is attributed by appellant to the fact the September 1963 contract provided a ceiling for mileage usage of Aircraft B-377 PG. The aircraft was to be furnished within forty-eight hours of notice from the contracting officer. Appellee had responsibility for meeting standards of safety and maintenance prescribed by FAA/CAB, and theoretically there existed a time -- twenty-two days in each month as calculated by appellant -- during which appellee would be "free to use" the aircraft for other contractual operations. All of the foregoing argument of the government is devoid of substance for it ignores a great many stipulated facts of real import, namely:

(1) The Grant of Exemption from Parts 1 and 8 of Civil

Air Regulations (T. 58, line 16 and T. 63) limited cargo solely to the S-IV Saturn and Apollo spacecraft modules, restricted persons carried to those designated by NASA; and permitted cargo and persons only to be carried between locations as prescribed by NASA.

(2) The Airworthiness Certificate (of the aircraft) (T. 58, line 19; T. 65) limited certification of the aircraft only for the special purpose of carrying spacecraft modules, persons and cargo for NASA; prohibited operation of the aircraft for any other purpose; and incorporated as part of the certificate the operating limitations (Restricted Operating Limitations).

(3) The Restricted Operating Limitations (T. 58, line 20 and T. 66) provided that the only flights authorized were those for the special purpose of carrying spacecraft modules, persons and cargo for NASA, and limited cargo, persons carried and travel of the aircraft as restricted in the Grant of Exemption.

(4) The September 1963 contract with NASA required that appellee "furnish to the government for its exclusive use and control one each B-377 PG Aircraft, Serial No. N1024V".

(5) No movement of Aircraft B-377 PG, following its successful flight, was made except at the direction and for the use of NASA, excluding crew training or check flights (T. 58, lines 23-27).

The roundabout argument that appellee might have used the plane for other operations if minimum or maximum use of it was not made by the government is pure speculation aside from

implying that the appellee bound by a contract with the government might find it worthwhile to breach that contract which reserved to the government the exclusive use of the aircraft.

In the latter portion of its brief the government acknowledges that "exclusive use" by government is the touchstone of public aircraft and then attempts by analogy to The Bases Agreement and the Convention on International Civil Aviation to show Congress intended the term "civil aircraft" to apply to commercial operations of an aircraft. This, appellee feels, tends to avoid the basic question in this proceeding. For more than thirty-nine years Congress has been concerned and dealing with Federal aviation legislation beginning with the Air Commerce Act of 1926. The history of such legislation shows the development of air law and along with it a consistent and continuing treatment of civil and public aircraft by definition. Where is a better example of Congressional intention than in the legislation from time to time enacted on the very subject of this controversy? The Bases Agreement is special legislation for a particular subject peculiar to the signatory nations and limited in scope, and the Convention on International Civil Aviation falls in the same category. Federal aviation legislation is comprehensive, has developed over a period of many years, and is precisely pertinent at this point. Moreover, the Federal Aviation Act already defines public and civil aircraft, follows a long history of such definitions, and Congress should not now be second-guessed as to intention by words used under different facts and circumstances. It may also be observed that perhaps

Congress knew exactly what it was doing in providing for two categories of aircraft in the Federal Aviation Act, namely, civil and public, and for only the special classes of civil and state aircraft mentioned in The Bases Agreement.

CONCLUSION

We accordingly submit the court below was correct in its determination that Aircraft B-377 PG was as a consequence of its use, the restrictions and limitations imposed upon its use, and the contractual obligation to provide the exclusive use to NASA, to be a public aircraft, squarely within the definition of that term in the Federal Aviation Act, and for such reasons respectfully suggest the determination of the trial court be affirmed.

Respectfully submitted,

JONES AND BEDNAR

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Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

/s/ Philip C. Jones

PHILIP C. JONES